Supreme Court, U.S.
FILED
MAR 6 1998
CLERK

No. 97-581

# In The Supreme Court Of The United States

OCTOBER TERM, 1997

PENNSYLVANIA BOARD OF
PROBATION AND PAROLE,
*Petitioner*

*vs.*

KEITH M. SCOTT,
*Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

## REPLY BRIEF FOR PETITIONER

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## ARGUMENT

In our opening brief, we argued that parolees' diminished expectation of privacy, combined with the important governmental need to conduct searches of their residences, provides the justification for constitutional approval of searches by parole agents without individualized suspicion of wrongdoing. In addition, we argued that to ensure compliance with conditions placed upon parolees, the government requires broad discretion to define the conditions under which parolees may be searched. Finally, we argued that, even if a consent to search provision like the one imposed here somehow fails to meet a reasonableness standard under the Fourth Amendment, the exclusionary rule should not be extended to parole revocation proceedings so as to preclude consideration by parole authorities of relevant evidence obtained in a search.

Respondent has presented several arguments, most of which have been addressed in our principal brief and the Brief for the United States. A few of respondent's contentions, however, warrant a reply.

### I. THE DECISION BELOW DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

In its order granting the petition for writ of certiorari, the Court invited the parties to address the question whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of parole. Petitioner and *amici*, including the United States, have addressed the question

in their briefs. Scott, however, takes the position that the Court should not address the question on which it requested briefing because, in his view, the decision below rests on an adequate and independent state ground. (Br. at 9-11). Respondent misperceives both the state supreme court's decision and this Court's precedent.

The Court has held that, while it must "ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the judgment," *Michigan v. Long*, 463 U.S. 1032, 1038 (1983), it possesses jurisdiction to review a state supreme court decision in the absence of a "plain statement" that the decision below rests on an adequate and independent state ground. *Id.* at 1044. Thus, when a state court decision

> fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed federal law required it to do so.

*Id.* at 1040-41. *Accord Ohio v. Robinette*, 519 U.S. ___, ___, 117 S.Ct. 417, 420 (1996).

Scott argues that, because the decision below relied upon an earlier state supreme court decision, *Commonwealth v. Williams*, 547 Pa. 577, 692 A.2d 1031 (1997), and because *Williams* in turn examined both state and federal law in outlining the rights of parolees when their residences are searched, the decision in this case rests upon an adequate and independent state ground. Scott is simply mistaken.



It is certainly true, as Scott says, that in *Williams* the Pennsylvania Supreme Court considered the meaning of Pennsylvania's consent-to-search form and held that:

> the parolee's [consent to searches as a condition of parole] acts as acknowledgment that the parole officer has a right to conduct *reasonable searches* of his residence listed on the parole agreement without a warrant.

*Id.*, at 588, 692 A.2d at 1036 (emphasis added). What constitutes a "reasonable search," under this acknowledgment, however, was treated by the *Williams* court as a question of constitutional law. The court thus evaluated the reasonableness of the search in *Williams* under the Fourth Amendment, *id.* at 585-90, 692 A.2d at 1035-38, and, *because the defendant in that case had raised the issue*, under the corresponding provision of the Pennsylvania Constitution as well. *Id.* at 590-94, 692 A.2d at 1038-39.

In this case, however, Scott raised, and the Pennsylvania Supreme Court decided, only a federal issue. The decision of the state supreme court in this case clearly relies upon federal law. Pet. App. 8a; *id.* at n. 6; *id.* at 9a. Indeed, the opinion expressly relies upon decisions of this Court under the Fourth Amendment. *Id.* Furthermore, the specific reference below to the *Williams* decision states as follows:

> In deciding what effect the signing of the consent provision had on Williams's limited rights *under the Fourth Amendment*, we "balanced the governmental interests involved in granting parole and supervising parolees with that interest

> of the private individual, i.e., the parolee, which has been affected by the governmental action."

Pet. App. 9a (emphasis added), *citing Williams*, 692 A.2d at 1035 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). It is thus clear on the face of the opinion that the state supreme court's review of the effect of the consent provision in this case was based on federal law.

The grounds for the decision below with respect to the effect of a consent to search condition on the validity of a subsequent search were decided under the Fourth Amendment. The decision does not rest on an adequate and independent state ground and, therefore, the Court possesses jurisdiction to decide the consent issue.[1] *Ohio v. Robinette*, 519 U.S. at ____, 117

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[1]We also note Scott's argument (Br. at 12 n.3) that, because the General Assembly of Pennsylvania enacted a statute in 1995 which authorizes warrantless searches of property where there is "reasonable suspicion to believe that the real or other property in the possession of or under control of the offender contains contraband or other evidence of violations of the conditions of supervision," Pa. Stat. Ann. tit. 61, §331.27a(b)(2) (Purdon Supp. 1997), this case is, in his words, a "poor vehicle" to answer the question of the effect of a consent provision. There are several things wrong with this position. In the first place, it is far from clear that "reasonable suspicion" within the meaning of the state statute equates with the state supreme court's understanding of "reasonable suspicion" under the Constitution. Pet. App. 10a. The court appears to require more particularized suspicion than that the property contains "contraband or other evidence of violations." Moreover, even if the statute *could* be interpreted as a legislative codification of the

(continued...)



S.Ct. at 420 (reliance on federal cases for holding confers jurisdiction).

## II. THE VALIDITY OF THE CONSENT PROVISION SHOULD BE TESTED BY ITS RELATIONSHIP TO LEGITIMATE PAROLE OBJECTIVES.

In response to our argument that the States' management of their parole systems presents special needs that support departure from the usual Fourth Amendment requirements of individualized suspicion and probable cause for a search, Scott takes the position that 1) a parole consent provision cannot be constitutional because it is not "voluntary" consent, and 2) it somehow is unfair to treat parolees differently than unconvicted free citizens with respect to searches of their homes and persons. These contentions require but a brief rebuttal.

1. Whether Scott's agreement to the consent to search

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[1](...continued)
Commonwealth Court decision in this case, it does not mean that the codification becomes the constitutional floor any more than a state regulation or practice by itself defines the level of conduct actionable under 42 U.S.C. §1983. *See Davis v. Scherer*, 468 U.S. 183, 194-95 (1984) (officials sued for constitutional violations do not lose immunity merely because their conduct violates statutory or administrative provision). Finally, as we have argued, since the constitutional minimum is less than reasonable suspicion, especially where there is consent, the legislative judgment of the Pennsylvania General Assembly may be different now than it was in 1995.

provision was equivalent to an unincarcerated person's voluntary consent to search is of no moment. Scott appears not to take issue with the general proposition that the government may subject parolees to very specific conditions that "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Morrissey v. Brewer*, 408 U.S. 471, 478 (1972). Instead, relying primarily upon the decision in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), Scott argues that because his agreement to these parole conditions takes place under circumstances that are what he calls "inherently coercive," the consent to search condition is not "voluntary" and therefore is unconstitutional. Scott misperceives the nature of the relevant inquiry.

a. If "voluntariness," as defined by Scott, were the litmus test, then no parole condition — regardless of its purpose or effect — could survive constitutional attack. The Court, however, has made it clear that parolees may be subjected to conditions governing their activities that could not be imposed upon the general public but which, because of the special need of the government to monitor parolees' behavior, are appropriate and thus constitutional. These restrictions include such conditions as a prohibition against changing residences without permission, a prohibition against consumption of alcohol, and a direction to refrain from associating with certain individuals or engaging in certain activities. *Morrissey v. Brewer*, 408 U.S. at 479. The States' decision to condition parole on a parolee's acceptance of these kinds of parole conditions is no less "inherently coercive" than requiring an agreement to permit searches of the parolee's home and effects while on conditional release from prison. The choice between remaining in prison on the one hand and parole with certain conditions on the other hand may be a choice between two unattractive alternatives; however, the choice remains with the parolee and it remains a voluntary



one.

Surely Scott would not take issue with the government's ability to require him, for example, to refrain from associating with convicted felons while on parole; Scott's decision to accept such a parole condition regulating his freedom of association is no less "voluntary" than his decision to accept a parole condition permitting searches of his residence without individualized suspicion. The validity of the parole condition should be tested by its relationship to legitimate state objectives, not by a fictionalized construct of "inherent coercion."

b. Even the Court's decision in *Schneckloth v. Bustamonte* — relied upon so heavily by Scott — is not to the contrary. *Schneckloth* involved the question of consent to search a motor vehicle stopped by state police officers on a highway. 412 U.S. at 220. Recognizing that there is "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations" where the question arises, *id.* at 224, and that "voluntariness has reflected an accommodation of the complex of values" implicated in the questioning of a suspect, *id.*, the Court determined that "the question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of circumstances." *Id.* at 227. The Court stated:

> As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent — the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

*Ibid. Accord Ohio v. Robinette*, 519 U.S. ____, 117 S.Ct. at 421

(touchstone of Fourth Amendment is reasonableness which is measured in objective terms by examining totality of circumstances).

Scott apparently does not dispute the legitimate need for searches of parolees' residences; indeed, he informs the Court that his argument " is not to denigrate the legitimate concern for the risk of recidivism on the part of parolees." (Br. at 27). Instead, he equates the presentation of legitimate parole conditions to an inmate under consideration for parole with "governmental coercion" (Br. at 18), and an unconstitutional "waiver" of rights. (Id. at 20). There is absolutely no basis in the record of this case that would provide factual support for coercion, and Scott cites to nothing. Moreover, the Court in *Schneckloth* plainly rejected the waiver argument even for unrestricted citizens. 412 U.S. at 235-42.

> There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

412 U.S. at 242.[2]

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[2]Scott's suggestion (Br. at 19) that somehow the absence of counsel and "open" proceedings (when an inmate decides whether to accept parole conditions) are evidence of unconstitutionality also was rejected by the Court in *Schneckloth*.
(continued...)



Scott clearly attempts to extract from *Schneckloth* more than what is there, even assuming its quite different factual basis may be compared to that of an inmate seeking parole.

2. Irrespective of the level of "voluntariness" on the part of an inmate deciding whether to accept parole conditions, the government must have the ability to impose parole conditions that are legitimately related to the purposes of parole supervision. As we argued in our principal brief, the value of an unannounced search for firearms which may be in the possession or control of a parolee already convicted of murder hardly can be questioned. Indeed, Scott's brief makes no attempt to attack the importance of this interest. What Scott suggests, however, is that the government should be required to treat parolees the same as unconvicted citizens, at least insofar as searches of their residences are concerned. (Br. at 26-27).

The short answer to Scott's suggestion, as we have argued, is that parolees are not the same as unconvicted citizens and the Court recognizes they need not be treated the same. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). However unpalatable this concept may be to Scott and his *amicus*, the Court has not retreated from the basic and unquestioned premise of parole: it is "conditional liberty properly dependent on observance of special . . . restrictions." *Griffin*, 483 U.S. at 874, *quoting Morrissey*, 408 U.S. at 480. The parade of horribles involving unconvicted citizens, advanced by Scott and his *amicus*, simply has no bearing upon the question of the importance of the relative interests in this case. Were it otherwise, surely the Court would not have gone to the lengths it did in decisions such as

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[2](...continued)
412 U.S. at 244-45.

*Griffin* and *Morrissey* to remind of the limited rights of parolees. *Griffin*, 483 U.S. at 874-75.

Acceptance of Scott's position would make the Fourth Amendment rights of parolees nearly the equivalent of those of free citizens. The Court should decline Scott's invitation.



## CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed.

Respectfully submitted,

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